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AUTHOR White, Janet M.
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ABSTRACT

The most significant change appearing in the collective bargaining area in 1989 was the drop in number of cases compared to recent years. The largest number of cases challenged the specifics of fair share fee level establishment and the processes in place for collection of fees. There were also a significant number of cases surrounding issues of layoff, termination, and suspension. The review addresses the following topics at the K-12 level: (1) constitutional issues; (2) recognition and representation issues; (3) rights and obligations of exclusive bargaining representatives; (4) scope of bargaining; (5) grievability and arbitrability; (6) judicial review of arbitration awards and employment relations boards rulings; and (7) strikes and sanctions. (MLF)

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BARGAINING

Janet M. White

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INTRODUCTION

In 1989 there was a substantial amount of collective bargaining litigation. Although there was one Supreme Court case, the cases taken collectively did not establish any significant new trends or patterns. Nevertheless, the cases were of interest and presented some unusual factual issues. Cases involving K-12 are presented in this chapter; cases involving higher education are reviewed in Chapter 8.

CONSTITUTIONAL ISSUES

The topic of fair share fees continued to be an issue in 1989 litigation. One Supreme Court case regarding bargaining issues was decided during the year.[1] In this case, which originated in Texas, the teachers' union challenged a school board policy which prohibited communications concerning employee organizations by teachers or with teachers during the school day. The union contended that the policy violated the teacher's first and fourteenth amendment rights. The appeals court held that the district's actions in limiting teacher communication were unconstitutional. The union filed an instant application for an award of attorney's fees under section 1988. The Fifth Circuit Court held that the union was not the prevailing party and was not eligible for the payment of fees. The union appealed to the Supreme Court. The Court reversed on the basis that the union was the prevailing party since it had materially altered the school district's policy limiting the right of teachers to communicate with each other concerning employee organization and union activities.

Another appeal in *Chicago Teachers Union v. Hudson*[2] was heard in district court. The original 1986 Supreme Court case dealt with the rebate of funds collected from nonunion members which were not used for bargaining activities of the union.[3] In 1989 the Chicago union moved for final judgment and release of funds collected from nonunion workers and deposited with the clerk of the court. The motion was filed on the grounds that the current fair share notice adequately protected constitutional rights of the nonmembers. The district court held that the plaintiffs were not entitled

1. Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486 (1989).
2. Hudson v. Chicago Teachers Union, Local No. 1, 708 F. Supp. 961 (N.D. Ill. 1989).
3. Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

to entry of final judgment since the court had not yet assessed damages.

A case from the Seventh Circuit also involved nonunion teachers challenging a procedural scheme to collect fair share fees from nonunion employees.[4] The union had filed suit in state court to obtain payment from nonunion employees of those fees determined due by the arbitrator as specified in the collective bargaining agreement. The employees moved for a preliminary injunction to intermit state court proceedings. Both the trial and appellate courts held that the nonunion teachers failed to carry the burden of establishing likelihood of success on the merits and that the collection scheme was constitutionally flawed.

An Ohio case was heard in the Sixth Circuit Court and involved an examination of the financial disclosure requirements expected under *Hudson*.[5] The nonunion teachers held that the state association had not met its obligation to provide financial data regarding the use of fair share fees charged to nonmembers. The court disagreed citing the financial provisions of *Hudson* which stated that absolute precision in the calculation of the fair share fee cannot be expected or required and that unions need not provide an exhaustive and detailed list of all their expenditures.[6]

In the final district court case, the provision of adequate explanation of agency fees as outlined in *Hudson*[7] was at issue.[8] The court found that the information provided by the union to the nonmembers regarding the use of fees was adequate since it was possible from the contested information to derive a simple bottom line percentage of total chargeable and nonchargeable expenses.

A Michigan case which originated nearly ten years ago was reviewed by the district court in 1989.[9] The case involved an injunction granted to prohibit a teacher's union from collecting future service fees from nonunion members until the union had adopted constitutional procedures for collecting the fee. The case hinged on two issues: first on the question of whether the union's calculation of the fee must be independently audited to reduce the risk that the fee would be excessive; and second on whether the court should have allowed discovery and examination of the financial data which the union planned to send to nonmembers. The court held that the auditor

4. Ping v. National Educ. Ass'n, 870 F.2d 1369 (7th Cir. 1989).
5. 475 U.S. at 307.
6. *Id* at 305.
7. Gwirtz v. Ohio Educ. Ass'n, 887 F.2d 678 (6th Cir. 1989).
8. Jibson v. Michigan Educ. Ass'n-NEA, 719 F. Supp. 603 (W.D. Mich. 1989).
9. Lehnert v. Ferris Faculty Ass'n, 707 F. Supp. 1473 (W.D. Mich. 1988).

was to verify the accuracy of the figures, but not to determine the chargeability or nonchargeability of certain items and that it was not necessary to pass upon the actual source documents in order to decide on the validity of the service fee procedures.

Another state case which cited *Hudson* as the relevant precedent originated in Indiana where the union held that since the payroll deduction for fair share fees in that state was "voluntary," the provisions of *Hudson* regarding rebate practices did not apply.[10] In examining the nature of the "voluntary" deduction, the court determined that although payroll deduction was not mandatory, payment of the fee was required. Therefore, the facts were judged to be similar to *Hudson* and the union was instructed to discontinue the contested rebate practice.

In another midwestern case the provisions of *Hudson* were at issue in Illinois where the duty of nonmembers to file objections to fair share fees was questioned.[11] In the case employees who were not members of the union contended that they were entitled to reductions to their fair share fees used for activities unrelated to collective bargaining regardless of whether they filed objections to fees as required by appropriate labor relations board rules. The court held that the employees must file objections to receive rebate of such fees.

The collection and use of service fees from nonmembers of unions was also challenged in the California courts.[12] In the case the employee challenged both the practice of withholding part of his paycheck as a service fee and the use of this fee by the union for purposes not directly related to negotiation, contract administration, and grievance handling. In an extensive examination of the rights of the union and the Public Employment Relations Board, the court determined that the Public Employment Relations Act prohibited the use of the service fee of objecting members for any activities other than representational obligations. In addition, the court upheld the right of the school district to collect service fees through involuntary payroll deductions.

In contrast, in the final state case involving fees, the South Carolina Education Association challenged state legislation prohibiting payroll deductions for membership dues to labor organizations on the grounds that the statute violated members rights under the first and fourteenth amendments.[13] The union contended that the legisla-

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10. Ake v. National Educ. Ass'n-South Bend, 531 N.E.2d 1178 (Ind. Ct. App. 1988).
11. Shinn v. Illinois Educ. Labor Relations Bd., 539 N.E.2d 847 (Ill. App. Ct. 1989).
12. Cumero v. Public Employment Relations Bd., 262 Cal. Rptr. 46 (Cal. 1989).
13. South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989).

tion was motivated by the General Assembly's displeasure with the union's speech related activities. The court held that the legislation was facially neutral and not a constitutional violation.

One district court case involved constitutional rights not related to fair share fees.[14] In the case a teacher charged that the school district's decision to transfer him to a less desirable position at another school was motivated by his earlier filing of a grievance regarding an unfavorable evaluation. The plaintiff filed suit under the first amendment right to associate freely and the right to petition the government for redress. The court held that filing the grievance was a proper exercise of his right to petition and that plaintiff's right to freedom of association was implicated as well.

RECOGNITION AND REPRESENTATION ISSUES

Unit Determination

Supervisory, Managerial, and Confidential Employees. Two 1989 cases evaluated the role of employees as related to management and supervision. The court of appeals in Indiana reversed and remanded a lower court finding that an athletic director, head football coach, and head basketball coach were supervisors and thereby excluded from the bargaining unit of school employees.[15] The court held that the coaches and athletic director were excluded only if they supervised full-time certificated employees. If the staff whom they supervised were not certificated, then these employees did not fulfill the definition of school employees as specified in the labor relations act, and the director and coaches in question would not be technically supervisory. The case was remanded for examination of the certification status of the supervised staff members.

A voluntary group of principals in Chicago sought to be recognized as a representative labor association contending that they were not supervisory employees since their supervisory roles were limited by district policy.[16] The court found that although the principals had little power or reason to directly perform most of the functions associated with supervisory employees, nevertheless they did hold enough responsibility to be classified as supervisors. Therefore,

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14. Stellmaker v. DePetrillo, 710 F. Supp. 891 (D. Conn. 1989).
15. Lawrence Township Educ. Ass'n v. Indiana Educ. Employment Relations Bd., 536 N.E.2d 563 (Ind. Ct. App. 1989).
16. Chicago Principals Ass'n v. Educational Labor Relations Bd., 543 N.E.2d 166 (Ill. App. Ct. 1989).

the court held that the principals were not educational employees and could not be recognized as a collective bargaining unit.

School Status. There were also two 1989 cases which determined whether the schools involved were public or private entities. In the first case from the Seventh Circuit, a private school challenged the authority of the National Labor Relations Board (NLRB) to require the school to remedy unfair labor practices in which the school was found to have engaged.[17] The school did not contest the unfair practice, but held that funding from the government directly controlled the wages and fringe benefits paid to school employees. Under these circumstances the school contended that it could not enter into an effective collective bargaining agreement with any union. The court held that although the school did receive some state funds, the state did not exercise sufficient control of school policy to exempt the school from the authority of the NLRB.

In another school status case the teachers' association in a Maine community challenged the private independent status of an academy which provided services as the community high school under contract with the local school district.[18] The association held that due to the contractual arrangement, the academy was not a private employer, but rather a public employer, and therefore the association should be allowed to represent the academy's teachers since it represented other district employees. The court disagreed holding that in spite of the contractual provisions, the academy continued to function as a private school free from the control of the local district.

Substitute, Part-time, and Nonprofessional Employees. One case involved nonprofessional employees from Michigan and a union which sought an accretion election to determine the status of a detention study hall supervisor and an attendance officer.[19] In an earlier election, the study hall supervisor had been listed as an aide and as such had voted in the election. The union contested the classification of the position and sought to include both the supervisor and the attendance officer as professional employees. An examination of these employees' duties by the court resulted in the decision that

17. National Labor Relations Bd. v. Potential School for Exceptional Children, Inc., 883 F.2d 560 (7th Cir. 1989).

18. Lee Academy Educ. Ass'n v. Academy, 556 A.2d 218 (Me. 1989).

19. Traverse City Educ. Ass'n v. Traverse City Pub. Schools, 443 N.W.2d 473 (Mich. Ct. App. 1989).

they were not professional employees and the petition for an accretion election was denied.

A second case originated in New York and involved clerical employees.[20] In the case a union sought to have a rival organization decertified and to be reorganized as the representative of the clerical employees. During the course of the process of decertification, the school district recognized the new union. The court hearing the union's appeal held that the issue was academic since the district's voluntary recognition had already provided the union what it sought and the rights of the parties would in no way be affected by the court's decision.

RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

Union Rights

In Oregon a labor organization challenged the validity of the school district's meeting for approval of the collective bargaining agreement.[21] In the case a labor organization sought an election to establish itself as exclusive representative agent for the district's classified employees and had petitioned the education relations board to hold a representation election. The petition was subsequently filed with the school board. Meanwhile, the board discovered some budget and levy problems which it chose to consider at an emergency meeting. Later in the same day, the board continued the meeting and acted on the new collective bargaining agreement which had previously been presented. The union challenged the second emergency meeting on the premise that formalization of the agreement may have the effect of precluding a representation election since an existing contract bars a petition for election. The court held that although the early meeting could be classified as an emergency, there was no reason to act on the bargaining agreement in a second emergency session without providing appropriate notice of the meeting.

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20. Mineola Union Free School Dist. Clerical/Secretarial Employees Ass'n v. Public Employment Relations Bd., 537 N.Y.S.2d 547 (App. Div. 1989).

21. Oregon Ass'n of Classified Employees v. Salem-Keizer School Dist. 24J, 767 P.2d 1365 (Or. Ct. App. 1989).

SCOPE OF BARGAINING

Mandatory Topics of Bargaining

The determination of which topics were mandatory and which were prohibited in collective bargaining negotiation continued to be at issue in several 1989 cases. The D.C. Circuit Court heard a case involving changes in working conditions of teachers at Department of Defense overseas schools.[22] In the case the Department had instituted new regulations which added a class period to the school day and mandated that teachers would give up planning periods and lunch periods as necessary to cover the classes of absent teachers. The union filed a grievance and the Department refused to bargain. The union then filed unfair labor practice charges holding that these new regulations had a significant effect on the working conditions of the teachers and were a mandatory subject of bargaining. The Federal Labor Relations Authority responded that the changes were an exercise of management rights and not bargainable. On appeal of this holding, the circuit court disagreed. The court conducted an extensive examination of the legislative history and intent of the Federal Labor Relations Act and determined that the proposed changes altered working conditions significantly enough to be a subject of bargaining under the Act's provisions.

A case heard in the District of Columbia Court of Appeals dealt with the school calendar as a mandatory topic of bargaining.[23] The board of education modified the school calendar to include provisions that teachers would start work one day earlier than usual and that Good Friday would be a regular school day. The end of the school year was shortened by two days, thus maintaining the original total number of working days. These alterations were made without negotiating with the union. The union challenged the changes and the court held that calendar decisions of this nature were subjects of employer discretion and not mandatory topics of bargaining under the union agreement.

Another case involving the school calendar was heard in Indiana courts.[24] In the case, the school board refused to bargain with teachers regarding calendar items which the board alleged were management perogative. On appeal from the union, the Indiana Ed-

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22. Overseas Educ. Ass'n v. Federal Labor Relations Auth., 876 F.2d 960 (D.C. 1989).

23. Public Employee Relations Bd. v. Washington Teachers' Union Local 6, 556 A.2d 206 (D.C. 1989).

24. Indiana Educ. Employment Relations Bd. v. Highland Classroom Teachers Ass'n, 546 N.E.2d 101 (Ind. Ct. App. 1989).

ucation Employment Relations Board (IEERB) ordered the board to cease and desist from refusing to bargain. The district sought judicial review and the court set aside the IEERB decision. On appeal, the appeals court held that the IEERB order complied with Indiana law and reversed the lower court's decision.

Classroom size was held to be a mandatory topic in a case from Illinois.[25] The court held that class size has a direct effect on the conditions of employment of teachers. Therefore, a balancing test between the interests of the employees and the interest of the district in maintaining unencumbered control over managerial policy was indicated. The court found that the balance was in favor of the teachers and held class size to be a mandatory topic of bargaining.

A grandfather clause in a collective bargaining agreement became the issue in an Indiana case.[26] The district had adopted a new program designed to improve classroom instruction and had assigned certain supervisors to evaluate the performance of classroom teachers in the new program. The union held that this supervision practice violated a provision of the collective bargaining agreement. The contested provision prohibited the changing of conditions of employment from those which were in place as local practice at the time of the agreement's adoption. Furthermore, the union held that the changes were a mandatory subject of bargaining under the agreement. The court agreed that the district had committed an unfair labor practice in instituting the evaluation program without bargaining for such a change.

Following a severe decline in the local economy a district in Pennsylvania negotiated an agreement with another district to send all students in grades 7-12 to the second district for education, resulting in the furlough of thirteen teachers in the originating district.[27] The teachers filed a grievance holding that such an alteration of policy should have been a topic of bargaining. The court held that the district had a duty to bargain with its teachers under these circumstances, and that failure to do so constituted an unfair labor practice.

In a New York case the district challenged a Public Employment Relations Board order regarding smoking in school buildings and

25. Decatur Bd. of Educ. Dist. No. 61 v. Illinois Educ. Labor Relations Bd., 536 N.E.2d 743 (Ill. App. Ct. 1989).

26. Board of School Trustees of Gary Community School Corp. v. Indiana Educ. Employment Relations Bd., 543 N.E.2d 662 (Ind. Ct. App. 1989).

27. Midland Borough School Dist. v. Pennsylvania Labor Relations Bd., 560 A.2d 303 (Pa. Commw. Ct. 1989).

school buses.[28] The court held that the district's policy prohibiting smoking in district buildings was a condition of employment and therefore a subject of collective bargaining. On the other hand, the prohibition against smoking in buses was not subject to mandatory negotiation since the state Commissioner of Education had issued a regulation banning smoking on buses and bargaining on the topic was thereby precluded by the same regulation.

Prohibited Topics of Bargaining

Personal service contracts required of teachers who were employed by the Army to teach military dependents were challenged on the grounds that they were in conflict with the tenure provisions of the collective bargaining agreement.[29] The Army refused to negotiate and the union appealed to the Federal Labor Relations Authority (FLRA). The Authority determined that the union's proposal to eliminate the contracts was outside the Army's duty to bargain since it interfered with the Army's right to hire. On appeal the court reversed finding no substantive interference with the Army's hiring prerogatives and held that the union's proposal was negotiable.

In another case involving the Army's duty to bargain, the Sixth Circuit Court found that the Army was not required to bargain with teachers and their union over wages.[30] In making its decision the court relied on the legislative intent and history of the Federal Service Labor-Management Relations Act.

In a New York case a district imposed regulations mandating financial disclosure and background investigations of nontenured employees as a condition of their continued employment.[31] The union held that such disclosure and investigations should be mandatory topics of collective bargaining. On appeal of the arbitrator's decision, the court disagreed holding that the strong public interest in detecting and deterring corruption was a paramount consideration in the district's policy and that the district could hardly be required to collectively bargain over anticorruption measures with the employees whose honesty and integrity were at issue.

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28. Rush-Henrietta Cent. School Dist. v. Newman, 542 N.Y.S.2d 440 (App. Div. 1989).

29. Fort Bragg Ass'n of Educators NEA v. Federal Labor Relations Auth., 870 F.2d 698 (D.C. Cir. 1989).

30. Fort Knox Dependent Schools v. Federal Labor Relations Auth., 875 F.2d 1179 (6th Cir. 1989).

31. Board of Educ. City School Dist. v. State Pub. Employment Relations Bd., 542 N.Y.S.2d 53 (App. Div. 1989).

GRIEVABILITY AND ARBITRABILITY

Presumption and Arbitrability

Consideration of arbitrability of a grievance was at issue in an Idaho case concerning the suspension of a teacher during a reduction-in-force.[32] The union filed a grievance which the district refused to negotiate holding that such action was in conflict with its duties and responsibilities to hire and fire. The court disagreed and remanded the case for arbitration.

In New York a decision by a school district to deny tenure to four teachers based on declining enrollment was viewed by the union as a violation of the provision governing layoffs thereby making it an arbitrable dispute.[33] The court determined that it was never the intention of the administration to reduce the staff, but rather the intent was to avoid long term financial commitments based on the projected enrollment decline. Therefore the issue was within administrative control and was not arbitrable.

In a case from Massachusetts, a custodian sought overtime pay for late night shift hours worked after midnight on Friday nights.[34] The custodian filed his claim with the local union, but the union found that the claim was not meritorious and refused to represent the custodian. Although the collective bargaining agreement provided that he could be represented at all stages of the grievance procedure by a person of his own choosing, and that he could pursue his grievance without union support, nevertheless, he sought judicial relief. The court held that it was inappropriate for the courts to assert their jurisdiction before the case had been heard by the local labor commission. The case was dismissed.

Two teachers in Oklahoma sought a writ forcing the local district to arbitration on the discharge of one probationary teacher and the deletion of coaching duties for the other.[35] The court held that state statute prevailed over the collective bargaining agreement and therefore the questions of dismissal and fixing duties of teachers were the responsibility of the local school board and not subject to arbitration.

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32. Bear Lake Educ. Ass'n v. Board of Trustees of Bear Lake School Dist. No. 33, 776 P.2d 452 (Idaho 1989).

33. Department of Educ., Diocese of Rockville Centre v. Lay Faculty Ass'n Local 1261, 545 N.Y.S.2d 730 (App. Div. 1989).

34. Johnston v. School Comm. of Watertown, 533 N.E.2d 1310 (Mass. 1989).

35. Mindemann v. Independent School Dist. No. 6 of Caddo County, 771 P.2d 996 (Okla. 1989).

A case in Washington dealt with sick leave provisions of an expired contract.[36] The teachers in question had attempted to cash in sick leave upon retirement under the terms of a prior collective bargaining agreement. The district refused to submit the grievance to arbitration on the grounds that the new agreement was silent on the subject of sick leave "cash in" upon retirement. The court held that notwithstanding the expiration of the agreement, the grievance could be processed through the grievance procedure to resolution.

In a New Hampshire case a second year teacher was nonrenewed for her third year on the grounds that she "was not a good fit" for the position.[37] She filed a grievance and the district refused to proceed to arbitration. The union filed an unfair labor practice action on the grounds that the discharge could be construed as disciplinary and would therefore be covered under the terms of the collective bargaining agreement. The court disagreed holding that the nonrenewal was management prerogative and not covered by the collective bargaining agreement.

A Pennsylvania teacher was dismissed, received a hearing, and, although he did not appeal the decision, proceeded directly to arbitration.[38] The district held that the grievance was not arbitrable under the terms of the collective bargaining agreement. The trial court found that although the collective bargaining agreement provided for arbitration in cases involving nontenured employees, it did not provide the same remedy for tenured teachers. The union challenged the trial court's jurisdiction holding that the arbitrator should properly make such a determination. The commonwealth court held that the trial court had jurisdiction since the arbitration proceeding had not begun.

The evaluation process to be used by the district was at issue in a case originating in New York.[39] The union held that the evaluation process was subject to arbitration and the district contended that it was an important part of public policy and thereby exempted from bargaining. The court held that the district must bargain about the evaluation process.

A dispute between the union and a private Japanese school based in New York involved a request for an injunction to prevent the school administration from proceeding with changes in current

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36. Naches Valley School Dist. No. JT3 v. Cruzen, 775 P.2d 960 (Wash. Ct. App. 1989).

37. *In re* Westmoreland School Bd., 564 A.2d 419 (N.H. 1989).

38. Middle Bucks Area Vocational Technical School Educ. Ass'n v. Executive Council, 552 A.2d 763 (Pa. Commw. Ct. 1989).

39. Board of Educ. of Enlarged City School Dist. of City of Newburgh v. Newburgh Teachers' Ass'n, 537 N.Y.S.2d 250 (App. Div. 1989).

practice prior to an arbitrator's decision regarding the practice.[40] The dispute resulted from a plan proposed by the Institute to change the format of Shunin-kai meetings which had been held between teachers and administration since 1963. The meetings were intended to promote communication between the two groups, and the union held that they had been successful in this effort. The meetings were held monthly and co-chaired by the principal of the school and the president of the union, or their designates. The administration wanted to change the meeting from a single meeting in one location to three concurrent meetings held in three separate locations. The union objected on the grounds that the top representatives (chairman and principal) would not hear the comments at each meeting first hand and that communication would suffer as a result. When the union filed a grievance, the administration agreed to postpone the proposed changes pending arbitration, but when the arbitrator set a date several months hence for rendering his decision, the administration set the concurrent meeting dates for the next three monthly meetings. The union sought an injunction to prevent the split meetings. The court granted the injunction, holding that the union membership could be irreparably harmed by the alteration of meeting format prior to the arbitrator's decision.

Who Determines

The question of who determines the arbitrability of a grievance arose from a challenge by a nontenured teacher who had been dismissed by the school district.[41] The union filed a grievance, the school district denied the grievance, and the union filed unfair labor practice charges. A series of appeals and actions ensued which resulted in a circuit court decision enjoining the union from proceeding with arbitration and the board from proceeding on the unfair labor practice hearing. The appeals court determined that under the Illinois Educational Labor Relations Act the circuit court had no jurisdiction to vacate, enforce, or enjoin an arbitration in the context of public educational labor disputes.

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40. Teachers Ass'n of Japanese Educ. Inst. of N.Y., Inc. v. Japanese Educ. Inst. of N.Y., 724 F. Supp. 188 (S.D.N.Y. 1989).

41. Board of Educ. of Warren Township High School Dist. 121 v. Warren Township High School Fed'n of Teachers, Local 504, 538 N.E.2d 524 (Ill. 1989).

JUDICIAL REVIEW

Propriety of Arbitral Awards and Agency Decisions

Salary Issues. In a New York case a teacher filed a grievance over a salary issue and pursued his grievance according to the terms of the collective bargaining agreement.[42] Ultimately he received an adverse decision. He then filed suit against his employer, the Board of Cooperative Educational Services. The court dismissed his claim holding that he could not sue his employer directly, but was required to proceed through the union in accordance with the terms of the contract.

Supplemental Duties. In a Kansas case a district policy mandating the supervision of noon recess and lunchroom duties was challenged as a violation of fair labor practice.[43] In the case a teacher objected to being assigned supervision of noon lunchroom or being assigned hallway duty at noon recess. The court held that the noon recess duty was related to the education process and therefore controlled by the primary contract, and that the contract allowed the school district to assign noon playground and hallway duty.

A South Dakota case also involved noontime responsibilities.[44] In this case teachers were assigned to hallway supervision during each of the seven periods of the school day and received no additional compensation for these assignments. Teachers assigned to lunchroom duty were compensated as provided in the collective bargaining agreement. The noncompensated teachers filed a grievance seeking compensation, but the court held that the collective bargaining agreement prevailed and specified compensation only for the lunchroom supervisors.

School Calendar. In Indiana teachers who were required to make up days at the end of the school year without compensation challenged the school board's right to require them to make up rescheduled days.[45] The district's policy called for a flexible calendar which provided that if more than five days were lost in each semester the additional days could be made up at several possible times during the week following the spring semester. The teachers challenged based on the state school closing statute which was amended after the disputed days were added to the calendar. The court conducted an extensive examination of the legislative intent of the stat-

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42. Sargent v. Board of Coop. Educ. Servs., 540 N.Y.S.2d 54 (App. Div. 1989).

43. NEA-Goodland v. Board of Educ. U.S.D. No. 352, Sherman County, 775 P.2d 675 (Kan. Ct. App. 1989).

44. Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 442 N.W.2d 926 (S.D. 1989).

45. Halley v. Board of School Trustees of Blackford County School Corp., 531 N.E.2d 1182 (Ind. Ct. App. 1988).

ute and concluded that the school board did not breach the collective bargaining agreement when it required the teachers to teach on the rescheduled days without additional compensation.

Medical Leave. In a California case a tenured teacher suffered from stress related mental illness presumably caused by difficulties with her principal.[46] She subsequently took sixteen months voluntary sick leave. After exhausting benefits through workers' compensation and state disability allowance, the teacher sought a return to work. Several psychiatrists issued opinions about her readiness to deal with job related stress, but the district psychiatrist held that she was not fit for work and the district refused to reinstate her. Furthermore, the district held that since she was not formally suspended, terminated, or placed on mandatory sick leave, she was not entitled to a reemployment hearing under the terms of the collective bargaining agreement. The court held that although the employee bears the initial burden of presenting medical evidence of recovery, the collective bargaining agreement which identified the district psychiatrist as the final determiner of fitness for work circumvented the employee's opportunity to present her case successfully. Furthermore, the action of the psychiatrist placed the burden of proof of the unfitness on the district and mandated a competency hearing. The court held that the provision of the collective bargaining agreement was in conflict with the requirements of the Education Code. The teacher was granted her appeal for a hearing and granted back pay from the date when she presented fitness for work statements from her doctors.

Reprimand. Refusal to attend a meeting with the assistant superintendent without union representation resulted in reprimand for a Michigan counselor.[47] The court held that the counselor had reason to believe that the proposed meeting might result in disciplinary action and he was therefore justified in his decision not to attend the meeting without representation.

Dismissal, Nonrenewal, Reduction-in-force, Layoff, and Demotion. A large number of cases resulted from challenges to decisions which terminated employment. A choir director in Montana was nonrenewed after three years of service under one year contracts and filed a grievance for violation of due process and breach of contract.[48] The court held that the director failed to follow the administrative

46. Raven v. Oakland Unified School Dist., 262 Cal. Rptr. 354 (Ct. App. 1989).

47. Wayne-Westland Educ. Ass'n v. Wayne-Westland Community Schools, 439 N.W.2d 372 (Mich. Ct. App. 1989).

48. Thompson v. Board of Trustees of School Dist. No. 2, Yellowstone County, 774 P.2d 412 (Mont. 1989).

procedure outlined in the contract and therefore gave up his right to final determination.

In another Montana case an employee brought action against the state superintendent for wrongful discharge holding that the Wrongful Discharge from Employment Act unconstitutionally limited her right to full legal redress.[49] The court disagreed finding that no guarantee of a fundamental right to a particular cause of action existed and therefore the plaintiff's rights had not been violated.

In an Illinois case a district refused to bargain over the impact of its decision to eliminate a maintenance foreman's position.[50] The employee relations board ordered reinstatement of the position and the district appealed after the expiration of the thirty-five days allowed for filing appeals. The district appealed to the courts, but the court dismissed the case for untimely appeal.

In another Illinois case, a sheet metal instructor at a vocational school who was certified only in that subject area, challenged his suspension following termination of the sheet metal program.[51] At a hearing pursuant to agency law, the teacher indicated that he was in the process of being certified in another vocational area, but waived his right to written adjudication and requested an immediate decision. His suspension was upheld. He appealed and the trial court upheld the suspension, but concurrently, the local agency filed a grievance which was brought to an arbitrator who sustained the grievance and ordered the district to consider realignment of its professional staff. The appeals court determined that the grievance was barred by the doctrine of election of remedies and affirmed.

Another case involving a vocational school teacher was heard by the Supreme Court of Pennsylvania.[52] In the case a mathematics teacher was furloughed due to declining enrollments and, although she was also certified in French, she was lowest in seniority in both departments. The union filed a grievance challenging her furlough and the arbitrator upheld the grievance finding that the district should have considered the teacher's seniority in relation to all teachers and should have reshuffled staff in any department to ultimately furlough the least senior employee among all departments. The court disagreed, citing the precedent that in no rational way

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49. Johnson v. State, 776 P.2d 1221 (Mont. 1989).

50. Board of Educ. Jacksonville School Dist. No. 117 v. Illinois Educ. Labor Relations Bd., 539 N.E.2d 882 (Ill. App. Ct. 1989).

51. Altoona Area Vocational-Technical Educ. Ass'n v. Altoona Area Vocational-Technical School, 559 A.2d 974 (Pa. Commw. Ct. 1989).

52. Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 553 A.2d 913 (Pa. 1989).

could the decision of the arbitrator be derived from the language and context of the collective bargaining agreement.[53] The court discounted the arbitrator's reliance on a state statute holding that he had chosen to ignore a clear legislative mandate that collectively bargained for methods of reducing the number of school personnel must supersede the methods delineated in the education code.

Another Pennsylvania case involved a school bus driver who was discharged for job abandonment and insubordination for his failure to provide appropriate medical excuses for absences from work.[54] He filed a grievance, following the procedure set forth in the collective bargaining agreement. The union pursued the grievance to arbitration where the arbitrator determined that the discharge should be converted to a disciplinary suspension without pay or contractual benefits. The bus driver then petitioned the court to vacate and/or modify the arbitrator's decision to provide back pay. The court held that the driver did not have standing to file the appeal since he was not a party to the arbitration. If any such petition was to be filed, it should properly be filed by the union. The driver also alleged that the union had breached its duty of representation by not filing the petition for back pay, but the court held that the driver would have to file an independent action against the union for breach of duty.

A temporary professional employee in Pennsylvania challenged the school district's alteration of his seniority which had been granted during periods of suspension.[55] The teacher had been assured that he would continue to accumulate seniority in a letter from the school board chairman, but no such provision appeared in the minutes of the relevant school board meetings. In the resulting grievance proceeding the district held that state statute did not mandate the continuance of seniority for temporary professional employees. The arbitrator disagreed, granted the seniority, and, on appeal, the court affirmed his decision.

In New York a conflict between the terms of a collective bargaining agreement and the provisions of state statute provided the basis for a case involving a teacher in a health tenure area.[56] The district decided to abolish two of five positions in the area and, in determining who should be dismissed, relied on the provision of the collective

53. Ringgold Area School Dist. v. Ringgold Educ. Ass'n, 414 A.2d 118, 120 (Pa. 1980).

54. Krenzelak v. Canon-McMillan School Dist., 566 A.2d 347 (Pa. Commw. Ct. 1989).

55. Upper Merion Area School Dist. v. Upper Merion Area Educ. Ass'n, 555 A.2d 292 (Pa. Commw. Ct. 1989).

56. Szumigala v. Hicksville Union Free School Dist. Bd. of Educ., 539 N.Y.S.2d 83 (App. Div. 1989).

bargaining agreement related to continuance of tenure in cases of voluntary transfer. The two dismissed teachers had seniority in the health area, but less total seniority than two teachers who were retained. The court held that the state statute provision that tenure should be considered in such a case only if in the relevant area prevailed over the terms of the collective bargaining agreement.

In contrast, in an Ohio case the court held that the collective bargaining agreement prevailed over state statute by interpretation of another statute.[57] The case involved a seniority dispute in which the district's determination of who should receive a particular assignment was challenged by the union. The district's defense relied on state statute which gave the executive officer of the board the right to direct and assign teachers. The court, however, relied on a state statute which prohibited unreasonable or absurd consequences. Since the transfer of teachers was a proper subject of collective bargaining, and since a bargaining agreement was in place at the time of the district's action, it prevailed over the statute regarding the assignment of the teacher.

An Idaho case began with a reduction in force which resulted in a regular teacher being placed in a special pool from which the district was bound by the collective bargaining agreement to select substitutes and teachers to fill open positions.[58] At the relevant time, the teacher was the lone staff member in the pool. A tenured teacher became ill and the pool teacher was called in as a substitute for about half of the days missed by the ill teacher. She was then called to substitute for the ill teacher for one entire year. In the third year, the ill teacher declined her contract and the district offered the contract to the pool teacher. She filed a grievance against the district holding that she should have taught all of the available days in the first year of the teacher's illness and that she should have been offered a regular contract for the second year. The court held that the district was negligent in its effort to contact her as the substitute for the days in the first year, but that the district could not have offered her the contract for the position in the second year since the position was not technically open.

A school bus driver in Pennsylvania was involved in an accident in which he was found negligent and ultimately discharged.[59] Al-

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57. Alexander Local School Dist. Bd. of Educ. v. Alexander Local Educ. Ass'n, 534 N.E.2d 107 (Ohio Ct. App. 1987).

58. Flemmer v. Tammany Elementary School Dist. No. 343, 774 P.2d 914 (Idaho Ct. App. 1989).

59. Garnet Valley Serv. Personnel Ass'n v. Garnet Valley School Dist., 563 A.2d 207 (Pa. Commw. Ct. 1989).

though he did not pursue his right for a due process hearing, the bus driver filed a grievance challenging his discharge. The collective bargaining agreement included a provision that in cases of discharge, arbitration would not be pursued where due process hearing procedures were available. The arbitrator held that the district should reinstate the driver with back pay, benefits, and seniority, but also provide a one week suspension; however, the court reversed holding that under the terms of the collective bargaining agreement, the parties did not intend to submit the dismissal to arbitration and therefore the arbitrator lacked authority to address the issue.

A tenured teacher in Michigan was laid off due to a reduction-in-force and used the period of her layoff to obtain certification in learning disabilities.[60] The district hired probationary teachers with less seniority to fill learning disabilities teaching assignments subsequent to her presentation of her new credentials. The court found that the district had violated the provisions of the collective bargaining agreement in not assigning her to the open positions.

Agency Review. In an Illinois case which originated five years earlier, the appellate court was asked to decide the propriety of the Illinois Labor Relations Board (ILRB) reconsideration and alteration of one of its own decisions.[61] The case had involved a dispute between the union and school district regarding the district's plan to reorganize part of an elementary school and a junior high into a middle school. The plan included expansion of the number of classes taught and alteration of the length of teaching period. On appeal to the ILRB, the hearing officer found that the district did not unlawfully refuse to bargain with the union over the impact of the decision to reorganize, since the reorganization was a matter of inherent managerial policy. The union filed an exception and, on rehearing, the ILRB held that the district had a duty to bargain over the impact of the decision to reorganize, specifically as the decision affected conditions of employment. The district appealed and the appellate court held that the ILRB had no authority to reconsider its order since an administrative decision is a final order if it terminates the proceedings before the agency and fixes the rights and liabilities of the parties involved.

In a similar case, the Ohio Supreme Court affirmed a lower court decision that when an appeal is filed in the courts, the admin-

60. Hodgeson v. Board of Educ. of Buena Vista School Dist., 438 N.W.2d 295 (Mich. Ct. App. 1989).

61. Board of Educ. v. Illinois Educ. Labor Relations Bd., 534 N.E.2d 1022 (Ill. App. Ct. 1989).

istrative agency loses jurisdiction over the decision.[62] In the case the union filed unfair labor practice charges with the State Employment Relations Board (SERB) and the Board deferred the matter to arbitration. The union appealed, was denied, and took the matter to court contending that the SERB decision was a final order. Later the union attempted to have the SERB decision vacated, but SERB denied the action citing lack of jurisdiction. On appeal the Ohio Supreme Court held that when a notice of appeal from a decision of an administrative agency has been filed, the agency is divested of jurisdiction to reconsider, vacate, or modify the decision unless there is statutory language to the contrary.

STRIKES AND SANCTIONS

In an appeal of a federal labor relations authority case, the Fourth Circuit considered a claim of the Department of Defense Office of Dependent Schools challenging the authority decision regarding negotiability and arbitration.[63] The court held that the decision of an arbitrator who was delegated authority by the Federal Services Impasse Panel was no different than the panel itself and thus was subject to agency head review. Furthermore, only when parties agreed to voluntary binding arbitration is the agency head unable to review and disapprove collective bargaining terms imposed by the arbitrator.

In a case from New Jersey a strike by teachers in 1984 resulted in payment to the school board of $70,000.[64] The amount of payment was challenged on appeal. The court found that the $10,000 per day payment was arbitrarily determined and not related to the losses incurred by the board. Therefore the case was reversed and remanded for further proceedings to determine actual cost.

In Pennsylvania a district and the teachers' union were unable to reach agreement on a new collective bargaining agreement prior to the end of the contract.[65] Consequently, the teachers went on strike for one week in September and struck again in January. The

62. Lorain Educ. Ass'n v. Lorain City School Dist. Bd. of Educ., 544 N.E.2d 687 (Ohio 1989).

63. Department of Defense v. Federal Labor Relations Auth., 879 F.2d 1220 (4th Cir. 1989).

64. East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 563 A.2d 55 (N.J. Super. Ct. App. Div. 1989).

65. St. Clair Area School Dist. v. St. Clair Area Educ. Ass'n, 552 A.2d 1133 (Pa. Commw. Ct. 1989).

district sought an injunction ordering the teachers back to work pending collective bargaining agreement negotiations. At a meeting at the courthouse, the disputing parties reached a tentative agreement which was approved by a majority of the board members and appropriate union representatives. Subsequently, an open meeting was held to officially ratify the agreement. At the meeting two members of the board who had originally voted for the agreement voted against it and it was not passed. The union filed an unfair labor practice against the board. It's claim was supported by the Pennsylvania Labor Relations Board and both the trial and appeals courts.

CONCLUSION

Although the volume of cases was still large, the most significant change appearing in the collective bargaining area in 1989 was the drop in number of cases compared to recent years. The largest number of cases challenged the specifics of fair share fee level establishment and the processes in place for collection of fees. There were also a significant number of cases surrounding issues of layoff, termination, and suspension. No other new trends appeared.